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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 PASHA S. ANWAR, et al.,

4 Plaintiffs,

5 v.

09 Civ. 118 (VM) (FM)

6 FAIRFIELD GREENWICH LIMITED,
7 et al.,

8 Defendants.

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9
10 October 16, 2012
2:00 p.m.

11 Before:

12 HON. FRANK MAAS,

13 Magistrate Judge

14 APPEARANCES

15 BOIES SCHILLER & FLEXNER LLP
Attorneys for Plaintiffs Anwar, et al.

16 BY: DAVID A. BARRETT
SACHI BORUCHOW (via telephone)

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18 LOVELL STEWART HALEBIAN JACOBSON LLP
Attorneys for Plaintiffs Anwar, et al.

19 BY: VICTOR STEWART

20 BROWN & HELLER PA
Attorneys for Citco Defendants

21 BY: AMANDA McGOVERN

22 CURTIS MALLET-PREVOST COLT & MOSLE LLP
Attorneys for Citco Defendants

23 BY: MICHAEL MOSCATO
24
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CAG7ANWC

APPEARANCES (via telephone)

KOBRE & KIM LLP

Attorneys for Defendant GlobeOp Financial

BY: DAVID MCGILL

JONATHAN COGAN

SIMPSON THATCHER & BARTLETT

Attorneys for Defendants Fairfield, et al.

BY: MARK CUNHA

JEFFREY ROETHER

HUGHES HUBBARD & REED LLP

Attorneys for Defendant Pricewaterhousecooper

Accountants NV and PWC Netherlands

BY: GABRIELLE MARSHALL

KIRKLAND & ELLIS

Attorneys for Defendant Pricewaterhousecoopers LLP

BY: AMY CRAWFORD

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(Case called)

(In open court)

MR. BARRETT: David Barrett from Boies Schiller & Flexner for the plaintiffs.

THE COURT: Good afternoon.

MR. BARRETT: Good afternoon, your Honor.

MR. STEWART: Victor Stewart from Lovell Stewart Halebian Jacobson for plaintiffs.

THE COURT: Good afternoon.

MS. MCGOVERN: Good afternoon, your Honor. Amanda McGovern from Brown & Heller for the Citco defendants.

MR. MOSCATO: Good afternoon, your Honor. Michael Moscato from Curtis Mallet on behalf of the Citco defendants.

THE COURT: Good afternoon. And who is on the phone?

MR. MCGILL: Good afternoon, your Honor. David McGill and Jonathan Cogan from Kobre & Kim, for one of the defendants GlobeOp Financial Services LLC.

MS. BORUCHOW: And this is Sachi Boruchow from Boies Schiller & Flexner for the plaintiffs.

MR. CUNHA: Good afternoon, your Honor. This is Mark Cunha and Jeffrey Roether from Simpson Thatcher & Bartlett representing the Fairfield entity defendants and certain individuals.

MS. MARSHALL: Good afternoon, your Honor. This is Gabrielle Marshall, representing PriceWaterhousecoopers

CAG7ANWC

1 Accounts and PWC Netherlands.

2 MS. CRAWFORD: Good afternoon, your Honor. This is
3 Amy Crawford from Kirkland & Ellis LLP, representing
4 Pricewaterhousecoopers LLP, also known as PWC Canada.

5 THE COURT: I gather that's it on the phone.

6 I have read the letters submitted both by both sides,
7 and was pleased to see that the issues have been narrowed and
8 that in terms of the 30(b)(6)s, I guess we are dealing with
9 just three issues. Why don't we start with those, Mr. Barrett
10 or Mr. Stewart.

11 MR. BARRETT: Yes. Thank you, your Honor. And I
12 guess it makes sense to do them one at a time, although I first
13 want to comment that the description in Citco's letter to your
14 Honor of an agreement on the procedure for the depositions is,
15 in our view, an overstatement.

16 We always reserved the right on certain of these
17 topics to pursue the 30(b)(6) witness notwithstanding. And, as
18 your Honor knows, there are a number of cases that say it is a
19 party's right under the law to have both the 30(b)(6) witness
20 so that you lock in the testimony of the corporation as well as
21 the individual witness. Nevertheless, on most of these we were
22 willing to proceed on a more informal basis, to look at the
23 documents, to take the depositions and then to see where we
24 are. But with respect to these three topics it doesn't appear
25 that that is working.

CAG7ANWC

1 The first one, as your Honor can see, is Citco's -- by
2 the way, there are six different Citco entities, and sometimes
3 they like to lump them together, sometimes they like to treat
4 them separately, but in any event --

5 THE COURT: Just so you are aware, I had some
6 involvement with Citco in the pension committee case, so the
7 entity is not completely unknown to me.

8 MR. BARRETT: Thank you, your Honor. And topic three
9 seeks Citco's knowledge or evaluation of due diligence
10 concerning Madoff conducted by the Fairfield defendants,
11 Pricewaterhouse defendants or, because of the issue I just
12 mentioned, other Citco defendants, since maybe one is going to
13 claim that they didn't have knowledge of something that another
14 one knew. And clearly these are relevant topics.

15 THE COURT: Just to interrupt you for a second, does
16 it matter from your perspective if Citco defendant one lays it
17 off on two through six? I mean it seems to me these are fairly
18 substantial entities. Maybe some of them are smaller than
19 others. But why does it matter if it's one Citco entity rather
20 than another that had some knowledge?

21 MR. BARRETT: Well, your Honor, I mean --

22 THE COURT: As a practical matter.

23 MR. BARRETT: I mean I can conceive of situations
24 where if you were trying to prove a fraud or a
25 misrepresentation claim it might make a difference if one

CAG7ANWC

1 entity knew this piece and another entity knew this piece, or
2 some circumstance like that.

3 We actually think that at the end of the day, both for
4 the reason that your Honor is stating, and because some of the
5 most critical documents like the audit materials that we
6 discuss later actually went to Citco's executive committee,
7 which is the most senior management committee, if there is
8 knowledge at that level it doesn't much matter which entity it
9 came up through.

10 In any event, your Honor, this particular topic is
11 perplexing to me. Last week two of the Citco entities -- I
12 guess the ones that are involved in custody -- the bank and
13 Citco Bank Netherland and Citco Global Custody -- produced a
14 witness named Scott Case as a corporate representative on among
15 other things topic two, which is defendants' due diligence
16 concerning Madoff, including but not limited to the due
17 diligence efforts referenced in a particular document. So,
18 they are already preparing a witness on their own due diligence
19 concerning Madoff. I would actually think that this topic
20 would be encompassed in the preparation on topic two, which
21 they have never objected to.

22 In any event, so, you know, this statement at the top
23 of page 2 of their letter about how this tremendous burden, 15
24 years, hundreds of employees, the fact is if they are able to
25 discuss their own due diligence, they are able to discuss -- I

CAG7ANWC

1 would think without any significantly more burden -- anything
2 they know about the due diligence or reliance they placed on
3 the due diligence of these third parties.

4 So, you know, I think that's what it boils down to.
5 We are entitled to have a witness. We are entitled to have a
6 witness on behalf of the entity, to give the entity's position
7 on this clearly relevant topic.

8 THE COURT: Why is this topic different than the
9 others in terms of the possibility of first taking folks as
10 fact witnesses and then asking for 30(b)(6) at the end if need
11 be?

12 MR. BARRETT: I don't know. Maybe Ms. Boruchow could
13 answer that with more specificity than I could.

14 MS. BORUCHOW: I would be happy to, your Honor. What
15 we're doing is actually a little different than that. We are
16 requesting fact witness depositions, and then Citco is telling
17 us whether those fact witnesses will cover any 30(b)(6) topics.

18 So, for instance, the deposition of Scott Case went
19 forward last week. That was a fact witness that we were
20 deposing, and Citco also designated him as the witness on
21 multiple 30(b)(6) topics. So, he ultimately was both a fact
22 and a 30(b)(6) witness on the topics that they agreed to.

23 The problem that we have is they are not agreeing to
24 designate anyone on the topics that we raised in your letter.

25 THE COURT: OK, fair enough. So, on that point with

CAG7ANWC

1 respect to this first topic let me turn then to Ms. McGovern
2 and say why is this topic different than all other topics.

3 MS. MCGOVERN: Thank you, your Honor. The issue for
4 the Citco defendants -- and just to correct the record, we do
5 view each of the corporate defendants separately. Sometimes I
6 think we probably make that point too much, we have been told
7 in the depositions, but we do.

8 The issue with respect to these three topics is very,
9 very simple: We view these topics as separate from the other
10 11 topics that we were able to -- with extensive good faith
11 negotiations with primarily Sachi Boruchow in Miami -- agree
12 to.

13 The problem that we have these three is that it
14 doesn't lend itself to the preparation of a single or even more
15 than one witness for purposes of designating the topic. So, if
16 we direct ourselves -- which is why we propose in the letter
17 the plaintiffs have identified 23 Citco witnesses, and as of
18 October 12 they have indicated that the last ten of them are
19 just the next round of those depositions, so --

20 THE COURT: Say that again.

21 MS. MCGOVERN: The plaintiffs have thus far identified
22 23 Citco-related witnesses.

23 THE COURT: Right.

24 MS. MCGOVERN: Many of whom are management-level
25 employees of the different Citco entities. The last ten of

CAG7ANWC

1 those witnesses that they have identified on October 12 have
2 been referred to as simply the next round. And the reason I
3 say that is because it suggests to us we are not nearly done.

4 The way we view these last three topics -- and one of
5 them is a bit different because we don't think that there is a
6 basis for it at all -- not to say they can't ask for question
7 on it, but we don't think it's appropriate -- but as to these
8 other two, we are looking at these two differently because the
9 preparation for them would require so much work on the part of
10 the Citco entities.

11 For example, number 3, number 3 requests defendant's
12 knowledge or evaluation of any due diligence or lack thereof
13 concerning Madoff conducted by the Fairfield and PWC
14 defendants.

15 Putting the Citco defendants aside, we agreed to topic
16 2, so there is really no reason to talk about the Citco
17 defendants in topic 3; it's redundant with topic 2 which we
18 have agreed to. So, that's really not on the table.

19 THE COURT: Tell me topic 2 again.

20 MS. MCGOVERN: Yes. Topic 2 is defendant's due
21 diligence concerning Madoff, including but not limited to due
22 diligence referenced in this particular document which refers
23 to one of the Citco defendant's due diligence with respect to
24 Madoff. We have not objected to that topic. In fact, we were
25 worried about the language in that topic "including not limited

CAG7ANWC

1 to," but we said OK.

2 THE COURT: And that document, I take it, is the one
3 that is excerpted on page 2 of Mr. Barrett's letter talking in
4 part about Madoff's audit firm being small?

5 MS. MCGOVERN: No, your Honor.

6 MR. BARRETT: It's not, your Honor.

7 MS. MCGOVERN: The document that's being referred to
8 in topic 2 -- and again topic 2 is not limited to that
9 document; it's any due diligence concerning Madoff. We have
10 agreed to that topic. And, in fact, you know, as they say last
11 week Scott Case, who was the managing director of Citco Bank
12 Netherland for a period of time, testified to that question and
13 to many other questions in which he wasn't even designated on
14 topics, although he was designated on a number of them.

15 But for us what is the issue is topic 3. They are
16 going to take at lease 23 witnesses of the Citco entities. The
17 questions are going to be asked of those witnesses. Their
18 knowledge -- which is what they're asking for -- will be
19 inquired during those depositions. And we have never said or
20 could object to those questions.

21 But to invert the process and to say we want you to
22 prepare a witness or two witnesses on very, very lengthy
23 relationship concerning third parties' due diligence, would
24 require essentially an interview of all of the 23 and perhaps
25 even more; it would require a whole bunch of document --

CAG7ANWC

1 THE COURT: Well, I assume you are not going to waltz
2 them into depositions without having interviewed them and
3 prepared them.

4 MS. MCGOVERN: No, I am not referring to our
5 preparation of the witness; I'm referring to what that witness
6 would need to do in order to be prepared as a 30(b)(6) witness
7 to testify about a corporation's knowledge, if it's even
8 possible to do that.

9 THE COURT: But the problem I have in terms of
10 understanding your objections is I assume that there were
11 associated document requests asking for any and all documents
12 that refer to the Citco defendant's knowledge of what the
13 Fairfield defendants may or may not have done. And if you have
14 the documents, then it doesn't seem like such an enormous step
15 to prepare one or more witnesses, whether it's designating 16
16 of the 23 in part as 30(b)(6) deponents, and perhaps adding
17 something beyond that if need be.

18 I'm not sure why the informal mechanism that you and
19 Mr. Barrett have described shouldn't apply here as well. It
20 doesn't sound like there is a significantly greater burden in
21 part because of what I said in documents and in part by what
22 Mr. Barrett said about Fairfield's due diligence being
23 incorporated in questions about Citco's due diligence.

24 MS. MCGOVERN: Well, the issue for us is that if the
25 depositions of the fact witnesses go forward -- and presumably

CAG7ANWC

1 the questions will be asked -- we believe that factual
2 knowledge -- and essentially it's an amalgamation of all of the
3 individual fact witnesses' knowledge regarding particular
4 events.

5 For example, we know with respect to PWC -- and if
6 it's considered to be due diligence, which we believe it would
7 be -- the unqualified audit reports that were issued every
8 single year, that would be certain documentation, but it
9 wouldn't be the extent of it.

10 And if in fact all of the witnesses that have been
11 identified are asked these questions, then that factual
12 predicate will be laid, and at the end of those depositions we
13 believe the issues will be resolved and this probably won't be
14 a dispute.

15 THE COURT: Will you then be willing to designate some
16 or all of those witnesses as your 30(b)(6) witness for purposes
17 of this topic?

18 MS. MCGOVERN: Yes, your Honor, absolutely. That was
19 really the way we viewed the process. And in fact if I could
20 just explain the process just for a second, because the
21 agreement that we reached was an agreement that was meant to be
22 as efficient with respect to document and deposition discovery
23 as possible. These witnesses live and reside outside the
24 United States, Amsterdam, Dublin, Curacao, Canada. They have
25 thus far all come here for depositions. The reason that we did

CAG7ANWC

1 that was precisely so that we're not, you know, sort of
2 bandying about with respect to the depositions.

3 And in terms of the application of the topics, we
4 worked through 11 of them. But at this particular point,
5 because we have so many witnesses down the road, many of whom
6 are management, as to this particular question on topic 3, as
7 to the knowledge with respect to what PWC did -- and we know
8 they're going to ask all of these witnesses -- at the end of
9 the day we don't think there is going to be a dispute as to any
10 remaining questions; and, if there are, the Citco defendants
11 would be willing to review their stated need for additional
12 testimony, whether it be in written form, whether it be in a
13 stipulation, however it would be, but we think it would be the
14 most efficient approach.

15 MR. MOSCATO: Or, if I may, or whether it means
16 identifying certain testimony that's already in the record as
17 being 30(b)(6), which I think your Honor was suggesting.

18 THE COURT: I mean the usual course or the more
19 typical course is that somebody testifies wearing two hats, it
20 being known at the outset, but I have certainly had cases where
21 after the fact witnesses are taken in their own right when
22 there is a request for a 30(b)(6) witness, retroactively
23 somebody, or a portion of somebody's testimony, is designated
24 as testimony given in the 30(b)(6) capacity so that it binds
25 the defendant.

CAG7ANWC

1 MS. MCGOVERN: Yes, we agree with that.

2 THE COURT: Let me just ask Mr. Barrett. If I deny
3 the request without prejudice to a later application, how are
4 you prejudiced?

5 MR. BARRETT: Well, your Honor, I suppose it's
6 principally an issue of burden. If what your Honor is
7 suggesting -- and I think this is a little bit of a twist on
8 what you're saying -- that any testimony that a fact witness
9 gives be designated automatically as testimony on behalf of the
10 corporate entity that that person works for, that I think is a
11 very efficient way to proceed. And then we don't have to
12 worry, because we know that when the witness speaks, he or she
13 is speaking for the corporation, even though obviously they may
14 say, well, I only know about, you know, subject X from 2002 to
15 2004; but on that piece of it they have spoken for the
16 corporation. That to me is sufficient.

17 The problem that I see with what defense counsel is
18 proposing is that it's going to be a huge production. And
19 nothing in this particular relationship has been particularly
20 easy, nor has communication been particularly effective, in my
21 experience here. We are going to go around and around on,
22 well, is it lines 12 to 24 of so and so's deposition, no, they
23 don't like that testimony because it didn't come out right, so
24 they're not going to agree to that even though it's pretty
25 clear that --

CAG7ANWC

1 THE COURT: But if that's the case, I'm going to view
2 very charitably a request for additional 30(b)(6) witnesses,
3 and if they are folks who reside in the Netherlands, or
4 someplace equally exotic, I'm likely to direct that they be
5 brought back at Citco's expense in fairly short order to
6 provide testimony, not specified particular individuals, but
7 some corporate representative, on those topics.

8 MR. BARRETT: Well, I understand --

9 THE COURT: It potentially puts you to the task of
10 taking a second deposition, but you are worried about the
11 possibility that the defendants will be somewhat surgical in
12 saying page 3 of the deposition but not page 4. I'm not
13 excluding that as a possibility, but if that happens, as I
14 said, I will probably allow follow-up 30(b)(6) depositions of
15 whoever they designate. But if I take Ms. McGovern at her
16 word, it may be that at the end of the day the 23 witnesses add
17 up to a full account under 30(b)(6).

18 And I guess if I were sitting in your seat, the
19 concern I would have is that something falls into a gap. But
20 it may be that that could be dealt with through a stipulation
21 or a short deposition where somebody is saying the Citco
22 defendants or particular Citco defendants are aware of no facts
23 beyond those testified to by witnesses 1, 3, 5 and 7.

24 MR. BARRETT: Well, again, I understand what your
25 Honor is saying. I do think, as Ms. McGovern points out, due

CAG7ANWC

1 to the breadth of Citco's operations and the lengthy time
2 period at issue, we are talking about a lot of witnesses here.
3 And the prospect of having to go through and ascertain whether
4 we need even more witnesses, I don't think it's one that is
5 particularly attractive to us or, I would guess, to Citco,
6 which is why I was suggesting that when the witness testify it
7 simply be deemed at that time to be 30(b)(6) testimony as well
8 as the individual's testimony.

9 THE COURT: Well, if I narrow what Mr. Barrett is
10 suggesting slightly and say that at a minimum it would be
11 30(b)(6) testimony for the particular Citco entity that that
12 person was working for in the relevant time period, is that
13 acceptable?

14 MS. MCGOVERN: Your Honor, unfortunately we are not in
15 a position to put every employee regardless of their position
16 with the company at a binding agent level. We would not be
17 able to do that.

18 I can say that I disagree with Mr. Barrett with
19 respect to the cooperation in the case. I'm a bit surprised,
20 actually. So, he can feel rest assured that the fact that we
21 have brought our witnesses to the United States, the fact that
22 we continuously resend in zip file fashion both documents and
23 privilege logs -- in fact this morning before I got on the
24 plane I sent a chart identifying documents by Bates label and
25 by description to see if we could resolve one of the issues

CAG7ANWC

1 they believe hadn't been produced. It has been a 24/7
2 situation, and the cooperation has been exhaustive.

3 In any event, we will not delay unnecessarily so the
4 designation of 30(b)(6) testimony. What we are trying to do
5 simply have these depositions taken in a timely fashion, not
6 put too much burden on a particular witness to have to know so
7 much. And again we believe that at the end of the day this
8 will not be a dispute.

9 THE COURT: Tell me the schedule currently for the 23
10 witnesses to be deposed, and tell me when deposition discovery
11 is supposed to end on the current schedule. I think I have
12 said before I feel like I have parachuted into the middle of
13 this litigation.

14 MS. MCGOVERN: I'm sorry. Would you like me to?

15 THE COURT: Whoever has those dates.

16 MS. MCGOVERN: I have a schedule.

17 MR. BARRETT: If you have it, please go ahead.

18 MS. MCGOVERN: Well, Friday there is a deposition in
19 Miami, and there are two depositions of Citco Bank Netherland,
20 and those are the October 19 --

21 THE COURT: Well, I am just asking the end date.

22 MS. MCGOVERN: Oh, you want an end date. Well, the
23 ten depositions that have recently been requested, we are
24 actually working with those individuals to get dates. And I
25 don't have them right now.

CAG7ANWC

1 THE COURT: OK. Does the discovery schedule have a
2 date, I assume, for the end of the depositions?

3 MS. MCGOVERN: I believe it's beginning of March form
4 the end of fact discovery.

5 THE COURT: So, there is a fair amount of time. And
6 the witnesses that are currently scheduled, what's the outside
7 date for those folks?

8 MS. MCGOVERN: Well, as I said, with respect to the
9 ten, these individuals we do not actually have dates yet.

10 THE COURT: I'm asking about the other 13.

11 MS. MCGOVERN: Oh, January 17th.

12 THE COURT: OK. So, there is a fair amount of time in
13 the schedule.

14 I'm going to deny the application without prejudice,
15 and we will see how we proceed.

16 If from the plaintiff's perspective it's not working,
17 you can certainly bring it back to my attention before you get
18 to witness 23, but I think it makes sense to wait.

19 As to topic 13, I guess Ms. McGovern complains that
20 you haven't yet indicated which portions of the manuals you
21 wish to receive.

22 MR. BARRETT: Your Honor, yes, I think this is really
23 a question of being assured, having a commitment in writing
24 that we have received the tables of contents for all the
25 manuals that are responsive, and then obviously we need to get

CAG7ANWC

1 back and obtain the sections promptly. And all of this
2 obviously needs to go forward promptly because the depositions
3 are ongoing. So, if in fact we receive the manuals, I think
4 that that goes a long way.

5 Now, there is also a request for instruction which may
6 not include manuals, and, you know, I don't know if the
7 defendants would agree to produce any instructional materials
8 that were used on these topics as well, but I think that would
9 probably largely vitiate this topic at this point.

10 THE COURT: Well, let me take it in two steps.

11 First, is there another tranche of manuals that is
12 going to be produced, or have you produced the universe?

13 MR. BARRETT: And let me just mention one area where
14 we haven't seen any manuals is the audit department, which, as
15 your Honor can see, is rather important here.

16 THE COURT: OK. Like I said, let me ask three
17 questions. First: Is there another tranche of manuals of any
18 sort that is going to be produced I guess in the form of tables
19 of contents, or does Mr. Barrett now have the universe?

20 MS. MCGOVERN: Your Honor, I believe that Mr. Barrett
21 has the universe. We did provide the tables of contents on
22 July 16. We did receive on October 10 a request for certain
23 sections of the tables of contents, but that was just a couple
24 days ago. I'm sure that we're going to be providing those
25 sections this week. But we did just get a request for those.

CAG7ANWC

1 In terms of whether we have produced all tables of
2 contents, I believe the answer is yes, but I will tell you that
3 we will advise by the end of this week if I'm mistaken, and we
4 will produce the remaining documents very, very shortly.

5 With respect to the instructions or lists, one of the
6 reasons that we had difficulty with this topic is we believe
7 that's very vague. I don't know what they're referring to when
8 they refer to table instructions and lists.

9 The way we have been producing documents, just so that
10 you might have a bit of context or color to this, is we have
11 produced the hard copies in this case. We have completed
12 production of the hard copies in this case some time ago, and
13 in fact, you know, in terms of the numbers, we have produced
14 about 300,000 hard copies.

15 THE COURT: 300,000 documents or pages?

16 MS. MCGOVERN: 300,000 documents and about a million
17 pages. And we have produced nearly a million pages in
18 electronic -- what we refer to as ESI. We are now working
19 within the ESI world, and those are -- they were all search
20 term hit-driven productions. So, we are not not producing
21 anything.

22 So, in terms of when we are completely finished, we
23 are not completely finished with all tranches of production
24 because we get getting new search terms from the plaintiffs,
25 which isn't meant to be -- you know, there is not meant to be

CAG7ANWC

1 anything harsh about that; I'm just stating the reality.

2 So, when you say instructions and lists, or when the
3 plaintiffs request 30(b)(6) document, we just don't know how we
4 would possibly prepare somebody for that. And, again, they
5 have the documents themselves.

6 THE COURT: Well, the request to get training manuals,
7 instructions or lists, really what they're asking for is
8 documents setting forth generic warning signs or red flags that
9 defendants' employees should be looking for with respect to
10 their clients.

11 MS. MCGOVERN: Those documents would be produced, your
12 Honor, in terms of our general production of electronic ESI,
13 because it contains search terms which would be a hit on those
14 documents.

15 THE COURT: OK. So, I take it your answer is: To the
16 extent you are able to, you have produced those documents.

17 MS. MCGOVERN: Yes. And to the extent that I'm
18 mistaken and there might be another tranche that would
19 incorporated some of that, we will confirm that with the
20 plaintiffs.

21 I'm just nervous about sitting here right now and
22 talking about the mega amounts of ESI that have been produced
23 and what might be remaining on this particular point. But we
24 will confirm.

25 THE COURT: Well, I mean ESI is always sort an

CAG7ANWC

1 iterative process, and perfection is difficult to achieve when
2 we are talking about large databases, I recognize that. But
3 one potential flaw that Mr. Barrett pointed out, and it's the
4 third concern, that apparently nothing emanates from the audit
5 department with respect to topic 13.

6 MS. MCGOVERN: Well, I'm not completely clear on what
7 he means by that. In other words, if the complaint is there
8 isn't a separate training manual for the audit department --
9 I'm not sure what the question is, actually.

10 MR. BARRETT: That would be hard to believe, your
11 Honor, that there weren't one. In fact I wouldn't expect it to
12 be ESI, I would expect it to be hard copy, a manual or
13 instruction on how to do audits. And presumably since one of
14 the things that we know the auditors were looking for --
15 because they found it here -- is potential fraud, that it would
16 be covered by this request.

17 MS. MCGOVERN: Your Honor --

18 MR. BARRETT: And this goes to one of the later topics
19 that we will discuss. All you have to do is go to the audit
20 department and ask them do you have manuals, do you have audits
21 that cover Fairfield Century. If you do, give them to us.

22 This doesn't require a complicated ESI search. All it
23 requires is going to one department and asking a couple of very
24 simple questions.

25 THE COURT: Well, it sounds like somebody did that at

CAG7ANWC

1 least in part since you have been given the document that you
2 quote on page 2 of your letter, which you yourself say came
3 from the internal auditors.

4 MR. BARRETT: Correct, your Honor. I but I think that
5 was produced through the search term methodology. And if you
6 want to jump ahead to the --

7 THE COURT: Well, let me just say this generically,
8 which is my view is always that if there is a request for
9 generic documents such as all audits concerning Madoff, that
10 it's fine to use search terms that the plaintiffs supply, but
11 that's not a substitute for -- to use Mr. Barrett's example --
12 going to the audit department and saying are there any such
13 documents sitting in your desk drawers or that are filed under
14 the name project McGovern that we couldn't predict would be the
15 way of finding it. And I assume that the Citco defendants are
16 doing that, and if they haven't, they certainly need to, in my
17 judgment.

18 MS. MCGOVERN: We agree with you 100 percent, your
19 Honor.

20 I know Mr. Barrett is anxious so get to the last topic
21 on this, but in terms -- but we have done that. We will
22 confirm with respect to any manuals that Mr. Barrett does not
23 believe have been produced. We will confirm that for him.

24 The search terms -- and we have independently, as
25 well, checked with every single employee, which was an

CAG7ANWC

1 incredibly exhaustive possess, with signatures, in terms of
2 hard copies and preservation and all that sort of thing. So, I
3 say that with confidence, but we will get back to Mr. Barrett
4 with respect to manuals on the audit. I also want to point out
5 that on November 8 Albert Van Nye will be deposed. Mr. Barrett
6 will be able to ask all of the questions he wishes to ask of
7 Mr. Van Nye.

8 THE COURT: Who is he?

9 MS. MCGOVERN: Mr. Van Nye was in internal audit, and
10 those are the documents that the plaintiffs have been using for
11 purposes of discussing the audit.

12 On December 6 Gerjan Meijer will be deposed, and Mr.
13 Barrett will be able to ask Gerjan all of the questions that he
14 has. We are getting there; we're just not there yet. And I
15 think Mr. Barrett will be able to come away with a lot of
16 answers and not sort of feel as though he is not getting them
17 once he takes these depositions.

18 THE COURT: I was going to say generically it seems to
19 me there will be lots of opportunity to discover if the
20 defendants didn't look in some particular trove that they
21 should have. And if they haven't, bring it to my attention,
22 and I will certainly deal with it.

23 I guess that brings us to subsequent curative measures
24 under topics 14 B, C and D.

25 MR. BARRETT: Well, yes, your Honor, except that if

CAG7ANWC

1 you look on page 2 of the appendix, the defendants conveniently
2 forgot that the request deals with policies and procedures, not
3 just after December 11, 2008 but for the period prior to that.
4 And that they don't apparently have any objection to at all,
5 unless it's this same sort of burdensomeness that we have been
6 hearing about. But I mean it's very straightforward. What are
7 the policies and procedures you had for opening customer
8 accounts, delegation of custodial responsibilities, and dealing
9 with the NAV and portfolio of the funds?

10 THE COURT: Well, they are not objecting to that,
11 therefore, I assume they are producing it except to the extent
12 that you are asking for changes to those policies or
13 procedures. Correct?

14 MR. MOSCATO: Right.

15 MS. MCGOVERN: Well, I must say that this is the first
16 time we have actually spoken about topic 14 in this way. This
17 14 has actually has been the subject of many communications,
18 the last of which from our end was July 31, and it is coming
19 back now in October.

20 So, you know, the position we have always taken with
21 respect to 14 is we believe that they were looking at someone
22 to testify for each defendant on subsequent remedial measures
23 without sort of justifying it. If it now also includes
24 policies and procedures before, this is a new topic because it
25 doesn't say that in the topic.

CAG7ANWC

1 MR. BARRETT: Sure it does.

2 THE COURT: Sure it does.

3 MS. MCGOVERN: But with respect to what?

4 THE COURT: At the time the litigated funds first
5 became customers, what were the policies and procedures for
6 opening accounts, etc? Under topic B, just by way of example,
7 and that clearly is asking before everything hit the fan what
8 were the procedures.

9 MR. BARRETT: And, C, your Honor, says defendant's
10 policies and procedures with respect to delegation, blah, blah,
11 blah, blah, blah, comma, and any changes that were made in
12 response to Madoff. So, the entire first clause is pre-Madoff.

13 MS. MCGOVERN: Well, your Honor, we took the letter
14 from October 9 as actually being directed to remedial measures.

15 In terms of the policies and procedures before, the
16 only thing that comes to mind in that regard is simply this:
17 The policies and procedures, for example, were discussed
18 extensively with Scott Case in his deposition on October 4. I
19 was actually there with Stewart Singer and Lewis Brown. And
20 they were discussed extensively with Scott Case. We did not
21 designate Scott Case as to this particular topic precisely
22 because it sort of frankly wasn't discussed for the last couple
23 months.

24 With respect to that aspect of topic, I think the same
25 protocol should apply as to asking the questions of the 23

CAG7ANWC

1 witnesses, because we think we will be able to have those
2 addressed.

3 THE COURT: That seems fine, but what Mr. Barrett was
4 saying was the only area -- if I can paraphrase what he said,
5 the only area in which you are declining to designate somebody
6 retrospectively, or to even make somebody available, is
7 subsequent curative measures.

8 MS. MCGOVERN: Your Honor, here is our position on
9 post-remedial measures. We think it's very clear that the rule
10 is very clear that subsequent remedial measures are
11 inadmissible to prove negligence, culpable conduct -- well,
12 actually in this case those are the two applicable.

13 But we take the position with respect to subsequent
14 remedial measures under Rule 407. And the plaintiffs in the
15 several months -- the last conversation that we had about this
16 topic had not shown that this issue is relevant on any issue in
17 this case or would be admissible on this case. They can't use
18 it to prove the Citco defendants were culpable or negligent.

19 THE COURT: Well, but how about if you get to the
20 "but" portion of 407? One of the topics, just by way of
21 example, that it can be admissible for is the feasibility of
22 probationary measures.

23 I mean my usual ruling -- unless you can convince me
24 otherwise -- and this certainly comes up frequently -- is that
25 admissibility and discoverability are two separate issues, and

CAG7ANWC

1 you may be 1000 percent correct on admissibility, but as to
2 discoverability it's not as black and white.

3 So, unless you convince me that there is some reason I
4 should depart from my usual rule, since evidence need not be
5 admissible if it potentially will lead to admissible evidence,
6 I'm likely to say that this is a topic as to which they can
7 inquire.

8 MS. MCGOVERN: Your Honor, we believe that they will
9 inquire of all of the witnesses, because we have no legitimate
10 basis in a deposition to preclude those questions. Our
11 understanding is we cannot instruct the witness not to answer
12 the question. In fact, Scott Case -- because it was the most
13 recent deposition, perhaps I'm using it as an example -- was
14 asked that very question. He answered it.

15 So, if your Honor is inclined to rule as you've done,
16 we're not there in terms of the admissibility yet, so perhaps
17 we don't cross that bridge, but we would just make two points
18 in this regard: The protocol should be the same. They will
19 ask the 23 witnesses. At the end of the day they may say was
20 there anything else, and we can perhaps address it with a
21 written stipulation.

22 The last thing I would suggest though is, you know --
23 well, that's actually it.

24 THE COURT: OK.

25 MR. BARRETT: Your Honor, we certainly appreciate your

CAG7ANWC

1 Honor's ruling. This issue -- and this is not a topic that has
2 been teed up for your decision today -- but in the defendant's
3 privilege logs, as I understand it -- and this goes to the
4 depositions that are coming up, because obviously you want to
5 have documents, not just the witness's recollection -- they
6 have taken the position that many, many documents are not
7 producible as work product even if they didn't involve an
8 attorney, on the theory that I guess as of the day after
9 Madoff's collapse they were preparing for litigation.

10 And as your Honor knows, that's not necessarily an
11 easy question. It may depend on whether it's primarily
12 business or primarily legal, but you certainly would think that
13 there was a lot of business incentive here. So, it may be that
14 we need to tee up that privilege issue for your Honor very
15 quickly so that we can get those documents as soon as possible
16 and not have to think about recalling witnesses and that sort
17 of thing.

18 THE COURT: All right. Every time I hear the word
19 privilege, I shutter for obvious reasons, but you may well be
20 right. And should that become the case, I would encourage you
21 to see whether there is a way on which I can look at the
22 documents if need be on a sampling basis, for example, so that
23 I don't have to look through 12,000 documents but perhaps can
24 look at two and say the same rules apply. If that's not
25 feasible, so be it, but I understand your desire for

CAG7ANWC

1 expedition, and when you are ready to raise that, let me know.

2 But I think I've made my general views known.

3 MR. BARRETT: Thank you, your Honor. I guess I'm
4 still not a hundred percent clear on where we are in terms of
5 requiring Citco to designate witnesses on the 14 topics,
6 certainly pre-dating, and I guess post-dating they have to
7 await further --

8 THE COURT: Well, I guess what I'm saying is it should
9 be handled the same way as all other topics. And apparently I
10 thought the concern was that they might direct witnesses not to
11 answer these questions on relevance grounds -- although that's
12 not really a proper objection -- but apparently they're not.

13 And, as I said, at the retrospective designation
14 stage, unless somebody convinces me otherwise, I will require
15 them to designate witnesses or portions of the testimony as
16 testimony that binds the companies. And then ultimately
17 whether that binding testimony should be heard by the finder of
18 fact is something I guess Judge Marrero will decide.

19 MR. STEWART: If I may just seek some clarification in
20 what you were saying a few minutes ago. I end up taking a
21 number of these Citco depositions, so I'm more in the
22 preparation mode of wanting to know the relevant documents that
23 a witness was involved with or may know about so I have a
24 chance to prepare to ask them intelligent questions that will
25 resolve certain issues.

CAG7ANWC

1 So, when I've heard talk about certain of these
2 training manuals and procedures in the audit department can
3 become known when various witnesses appear, and they can be
4 examined by our attorneys, to me that is a bit prejudicial to
5 us in the sense that Judge Marrero created a very hard deadline
6 in March, after extending our discovery for fact discovery
7 deadlines several times, and we're endeavoring to make sure
8 that we have completed all of our discovery by that time. And
9 if instead of having the benefit of any manuals, or
10 instructions, or lists concerning warning signs that actually
11 are in existence today, if we don't have the benefit of having
12 those before these depositions come up so we can properly
13 prepare and ask all of the questions at the depositions, then
14 we're creating an accumulation of potential issues at the tail
15 end of our fact discovery period.

16 THE COURT: Are you talking about those documents that
17 are on the privilege log, or something broader than that?

18 MR. STEWART: I'm talking about the documents that
19 aren't on the privilege log but are specific types of generic
20 documents that we had requested, such as training manuals and
21 such.

22 THE COURT: I had heard -- perhaps I misunderstood,
23 and, if so, you should tell me -- but I thought I heard
24 Ms. McGovern say you have those documents or, at least as far
25 as the manuals are concerned, the indices. I thought what she

CAG7ANWC

1 was saying to the extent that you doubt it is complete -- for
2 example, with respect to documents emanating from the audit
3 department -- you can inquire about that to satisfy yourself
4 that there are no gaps in their production.

5 I didn't hear her say sort of a game where if you get
6 the witness to say a document exists, we'll turn it over and
7 then you can explore it with that or another witness.

8 MR. STEWART: So long as that's clear, your Honor.
9 Because the other subtext to a lot of our difficulties in this
10 discovery is that it is all search term driven, and the times
11 we have identified certain documents by a name that Citco has
12 given, they are certain documents they regularly produce.

13 So, rather than wait for search terms to produce
14 copies of these documents, we have tried to get all documents
15 with this name. So, we just don't want to be in a situation
16 where there is any ambiguity left as to whether certain generic
17 or identified-by-title documents we have asked for get
18 produced, and we are not waiting for further search terms to
19 produce them, or to find out that they exist through deposition
20 testimony, when we have clearly asked for them beforehand. If
21 that's clear, then I have no problem with it at all.

22 THE COURT: Well, Ms. McGovern was nodding her head up
23 and down as to the first of those, so I think it's clear. And
24 as to the second, she earlier told me, using the audit
25 department as an example, that they weren't just relying on

CAG7ANWC

1 search terms.

2 So, unless you tell me there is some issue there,
3 Ms. McGovern, I assume there is no issue there.

4 MS. MCGOVERN: You're absolutely correct, your Honor.

5 THE COURT: Well, one question I had going to the top
6 of page 3 of your letter, it says, "Plaintiffs will have all
7 responsive audit reports prior to the deposition dates of the
8 internal audit personnel." And I wrote in the margin, when is
9 that that you will produce the audit reports?

10 MR. BARRETT: Well, your Honor --

11 MS. MCGOVERN: That's correct, your Honor. We did
12 make that commitment. And I was going to wait for Mr. Barrett
13 to make his, but I can tell you that we have as much desire to
14 produce all audit-related reports as the plaintiffs do. But as
15 I was speaking with Mr. Barrett's associate last night at about
16 7 o'clock when he called to say, "we can't find the 2007 audit
17 reports; can you tell me where they are; maybe this is a
18 misunderstanding," we both recognized on the phone that these
19 documents have different file names and different titles.

20 We have identified them. We have produced over 255.
21 There are many, many, many drafts. And, as I was explaining
22 last night as well to Adam Deckinger, we didn't just produce
23 one. If that draft went to three different people, they got
24 those because we believed they were entitled to all of them.
25 We are being incredibly detailed and thorough on this.

CAG7ANWC

1 So, what we have, we have been able to identify the
2 documents that are in the pipeline for production, and we have
3 a commitment to produce them before the internal audit
4 depositions. And I had mentioned that the first one is
5 November 8, which means we're trying to get the rest of those.
6 I believe there is about 60 left.

7 The reason that it takes time is that the audit
8 report, it's not just a Fairfield audit report; this is the
9 company's internal audit on all fronts, on all things. So, you
10 know, it reflects Fairfield Century was a high risk fund
11 because of the structure of the fund, which was the structure
12 of the fund from the early 1990s. It was always reflected as a
13 high risk fund; it will always be reflected as a high risk
14 fund. They want all of those documents, they are entitled to
15 them. We want to produce them. There are still some left in
16 the pipeline, and we have committed in our letter to your Honor
17 to produce them before the deposition of Albert Van Nye.

18 THE COURT: But I take it not the day before.

19 MS. MCGOVERN: No. What we do -- what we're hoping to
20 do -- what we have done thus far with all witnesses, by the
21 way, that have been deposed, is all documents related to that
22 deponent have been produced at least a week in advance. That
23 doesn't mean we wait and we hold on to them and then release
24 them the week before. I mean that's sort of like the cut-off.

25 THE COURT: OK. And that is what I was about to

CAG7ANWC

1 suggest, so it sounds like it's being handled.

2 I had moved on to the audit reports and watch list.
3 Was there something else on topic 14 that you wanted to raise,
4 Mr. Barrett?

5 MR. BARRETT: No, your Honor, I think that covers it.

6 THE COURT: And have we covered the audit reports and
7 watch lists.

8 MR. BARRETT: Well, there are a couple of points on
9 that, your Honor. First of all, the audit reports and watch
10 lists are not relevant only to the people in the audit
11 department. Indeed, they may be more relevant to the people
12 outside the audit department who received them and then did or
13 did not take action based on those reports. So, while it would
14 be nice if in fact we -- and I expect we will -- get what
15 Ms. McGovern is talking about by November 1, frankly we should
16 have had it a long time ago. You know, it may be necessary --
17 to the extent that relevant information is produced
18 subsequently -- to continue depositions of certain witnesses.

19 Secondly, while there may have been 200 or 300
20 so-called audit reports produced, a large number of those do
21 not deal -- and we appreciate that, and we think they should be
22 produced. On the other hand, they don't deal with the key
23 subject areas that I'm sure that your Honor understands.

24 For example, Exhibit C in the letter that we sent your
25 Honor, which is quoted at the end of footnote 1, is a document

CAG7ANWC

1 that's entitled "Citco fund services internal audit, executive
2 summary of audit activities and findings quarterly report".

3 Now, we have looked -- and I can't tell you that we
4 haven't missed something -- but we have looked for comparable
5 quarterly reports to this document, you know, from the outset
6 through 2008; and I don't have the exact number, but it's
7 certainly less than half a dozen of those that have been
8 produced.

9 Now, we accept the fact that Citco may be searching
10 using search terms, and that they're producing whatever audit
11 reports appear by using the search terms, but this is where I
12 get back to what I suggested to your Honor a little bit
13 earlier, which is because it is now clear that these are very
14 important documents -- and I'm referring to the quarterly or
15 annual audit reports and to these so-called watch lists -- that
16 Citco just go to the audit department and ask them to provide
17 all reports of that nature which have some discussion of
18 Fairfield funds or Madoff. That's all. It's a very simple
19 request, and it's to go to the audit department. We don't have
20 to use search terms, as the case we cite suggests. If there is
21 another way to get at it and it's not particularly burdensome,
22 that's an appropriate way to proceed as well. And we think
23 that that's something that maybe that can be done within a week
24 or two, but at least we will have these quarterly reports and
25 we will have a complete set of them.

CAG7ANWC

1 So, you know, I would make that request in order.
2 Then if they continue with the key word search process in the
3 production they are engaging in, I think we would be in a much
4 better position to proceed with these depositions.

5 MS. MCGOVERN: Your Honor, we've done that. We are
6 not relying merely on whether the plaintiffs have figured out a
7 search term that's going to capture what we believe to be a
8 relevant document. We have produced over a million pages of
9 ESI. We have a tremendous amount of resources dedicated to
10 getting the plaintiffs all responsive documents. The last
11 thing in the world that's going to happen in this case is that
12 a witness is going to say something has not been produced.
13 We're simply advising the plaintiffs that we are working
14 through the ESI as we can.

15 With respect to the audit reports, we have identified
16 the audit reports that we still have in the pipeline. It is
17 what it is. The documents are what they are. When they take
18 the deposition of Albert Van Nye and Gerjan Meijer, who will be
19 coming to Miami for their deposition to facilitate the
20 deposition process, they will have all of the documents we
21 talked about, and they will have the time they need as allowed
22 under the federal rules to ask their questions. I don't see
23 what else we can do, your Honor.

24 THE COURT: Is the quarterly report, May 2004 that I
25 have, is that -- well, I guess the answer is it says ESI, so

CAG7ANWC

1 it's ESI. I just noticed that.

2 MS. MCGOVERN: Yes.

3 THE COURT: So, this was produced from an electronic
4 file. I take it to the extent that there are similar reports
5 for other quarters, those will be produced at least a week
6 before the first witness as to whom they relate testifies?

7 MS. MCGOVERN: That's correct, your Honor.

8 THE COURT: I think that pretty much covers that, Mr.
9 Barrett.

10 MR. BARRETT: Well, we will certainly ask the witness
11 if there were quarterly produced each quarter, and if we don't
12 have them, what happened to them.

13 THE COURT: OK. And it may be as to many of these
14 topics that ultimately what is needed is a 30(b)(6) from
15 somebody who is a document custodian or who oversaw the search
16 for documents, so you can satisfy yourself that if there were
17 gaps, they are gaps that exist rather than gaps that were
18 created because somebody didn't ask the right custodian or look
19 in the right file.

20 That brings us to telephone logs, calendars and
21 diaries, where Ms. McGovern represents there are none. I think
22 that falls in the same category of if you don't believe it, you
23 can ask a document custodian.

24 MR. BARRETT: And if I could just ask Ms. McGovern to
25 clarify, does the assertion that there are none also apply to

CAG7ANWC

1 notes that somebody might have taken that were not kept in a
2 diary or similar kind of document?

3 MS. MCGOVERN: Yes.

4 MR. BARRETT: In other words, you know, you and I sit
5 here with our yellow pads taking notes --

6 MS. MCGOVERN: Yes, yes. Because we understood this
7 request to pertain to documents that were maintained in hard
8 copy. And we are confident that the answer is no.

9 THE COURT: OK. And that brings us to the privilege
10 log, where candidly I think Ms. McGovern's point is well taken.
11 If there are particular documents that you think potentially
12 are not privileged -- and there may be a lot of them. I would
13 imagine the privilege log is long -- and you can convince me
14 that you need more of a description, then I will certainly
15 require that that be provided.

16 But, frequently, given e-mail chains, the re line is
17 wholly inaccurate description. I recognize that there is sort
18 of a sliding scale in terms of specificity between a
19 description that is so specific that it reveals the privileged
20 information contained in the communication, or at the other
21 extreme so generic as to be useless. And it may be that for
22 particular documents the re line more so than the file name
23 will be necessary. But I don't want to create a makework
24 exercise where it wouldn't serve a purpose.

25 MR. BARRETT: I certainly understand your Honor's

CAG7ANWC

1 point with respect to the re line. I wonder, however, if it's
2 a little different with respect to attachments, because at
3 least the way that the privilege log is essentially done, you
4 know, it describes a subject matter, e-mail chain and
5 attachment relating to whatever apparently privileged topic,
6 let's say hypothetically.

7 But it would seem to me that the name of the
8 attachment is additional information; it shouldn't reveal
9 anything that's privileged. I mean the fact that somebody
10 said, you know, chronology of Madoff relationship doesn't make
11 it privileged. If the title of the document happened to be
12 "We're guilty of fraud in connection with Madoff," I agree that
13 would present a privilege problem. But virtually no document
14 is going to have that, but we are entitled to know the
15 substance, the attachment by its name. And this is all
16 presumably electronically available, which is the point I think
17 of these cases. So, it really is not the kind of burden that
18 you would have had in the old days with having to manually go
19 through everything.

20 THE COURT: Well, when you are talking about file
21 name, I'm not sure what you are talking about. If it's c:/
22 whatever -- which is what I read your request to be -- I'm not
23 sure that that adds much of anything, as opposed to the subject
24 line.

25 In terms of attachments, in particular instances again

CAG7ANWC

1 you may be right, but it strikes me that particularly for
2 attachments it would be an enormous amount of work, potentially
3 with very little in terms of additional information to be
4 supplied to you that would enable you better to challenge
5 privilege assertions.

6 So, if you can narrow the scope of where you are
7 asking that that be done, I will certainly consider it, but to
8 say the entire privilege log should be augmented in that way, I
9 think that's overkill.

10 MR. BARRETT: We will do that. Thank you, your Honor.

11 THE COURT: Anything else?

12 MS. MCGOVERN: No, your Honor.

13 THE COURT: OK, thank you.

14 MR. BARRETT: Thank you.

15 THE COURT: Are counsel going to order the transcript
16 of this proceeding?

17 MS. MCGOVERN: Yes, please.

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